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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

WILLIAM KINZELL,
Petitioner,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Respondent.

No. 485

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO.

BRIEF FOR RESPONTENT

STATEMENT.

The statement made by the petitioner is not based upon the facts. It is incomplete and calls for a statement by respondent.

The petitioner sued the respondent railroad to recover damages for personal injuries suffered in its service, alleging in his complaint (*Record*, 1, 6) negligence on its part as the cause of said injuries.

The facts of the injury consequential to the accident, which occurred in the doing of the work in which he and the railroad were engaged, are not disputed. Ex-

cept as to those facts, the case was defended on the general issue and the pleas of assumption of risk and contributory negligence.

The work being done, the happening of the accident and the injury suffered, took place within the State of Washington. The workmen's compensation act of that State, in force at the time, makes provision for full compensation to injured employes and precludes all litigation between employer and employe where the injury arises out of employment which is clearly separable and distinguishable from employment in interstate transportaton (Laws 1911, Chap. 74). So that if the work being done by the petitioner was not connected with interstate transporation, no legal cause of action accrued at the place where the injury occurred and no action against the respondent can be maintained. *Raymond vs. Chicago, Milwaukee & St. Paul Railway Company,* 243 U. S. 43.

In view of that condition, the petitioner elected to prosecute his cause as one authorized by the Federal Employers' Liability Act (*Record,* 18), thereby taking the burden of proof to establish affirmatively and positively that his injury occurred in connection with work not covered by the Washington compensation act, but with work indispensable to interstate transportation; for such proof is an essential element of the cause of action within the purview of the federal act. The action was commenced and prosecuted in the State of Idaho, and, in the trial court, the petitioner charged two acts of negligence, (a) excessive speed of the train when making the coupling and (b) failure

to have upon the rear car an attachment called "tail air hose," used in stopping a train (*Record* 5).

The court below sent both questions to the jury, a verdict was returned and judgment entered in petitioner's favor. Whether the jury arrived at their verdict on both these grounds or one of them, or, if so, upon which, no one can say, so that if either was improperly submitted, there should be a new trial. By motion for new trial and by appeal to the Supreme Court of that State, the railroad contested the petitioner's charges of negligence, the permanency and seriousness of his injuries, the interstate character of the work in which he was engaged, raised questions as to the fairness of the trial, the sufficiency of the evidence to justify any verdict for petitioner, the excessive verdict, the soundness of the court's ruling in admitting and rejecting evidence and in refusing to give requested instructions to the jury, and also alleged errors of law in the instructions of the Court to the jury (*Record*, 54; *Assignments of Error on file, but not printed*).

On the appeal the whole controversy was re-litigated and federal questions of vital importance, in addition to the one of federal law, were submitted for decision. In disposing of the case that court considered only one federal question,—whether the petitioner suffered injury while performing a service in interstate transportation. It reserved for decision all other federal questions, saying in the opinion:

> "While a number of errors are assigned which appear to be worthy of careful consideration, the

question which will dispose of the case, according to the conclusions we have reached, is whether respondent was within the terms of the act (meaning federal act) at the time the injury occurred. The other matters presented will not, therefore, be discussed in this opinion." (*Record*, 279, 280).

On consideration of that single federal question, the judgment was reversed and the trial court was instructed to dismiss the action (*Record*, 282).

The cause is brought to this court by a writ of certiorari, and if, with respect to the one question which the Idaho court decided, this court reaches a contrary conclusion, the railroad is entitled to have all the other federal questions involved in its appeal determined by an appellate tribunal before the judgment for exorbitant damages can be enforced against it. If reversal occurs, we ask that the mandate be in accordance with the customary conclusions of this court, namely, "that the case be remanded for further proceedings not inconsistent with this opinion," so that respondent's rights in the premises will be fully protected.

Of course, if the proceedings granted pursuant to the writ shall eventuate in affirmance, the litigation will be terminated. Not knowing whether in this proceeding under the act of September 6, 1916, the court will exercise its discretion and take cognizance of the case in its entirety and decide all the questions which the Idaho Supreme Court refrained from considering, or, whether it will confine itself to the one question dealt with by that court, we are compelled to lay the whole cause before this court.

The Work and Petitioner's Connection Therewith.

The uncontradicted facts which established that petitioner's relief, if any, must be through the Washington compensation act and not by way of the federal statute, are these:

The railroad, at and prior to the time of the accident, was an interstate railroad carrier. Its business, as such, compelled it to do many things having no immediate relation to the transportation of commerce; it was constantly required to construct and build in advance, to be in readiness to substitute the new for the old whenever and wherever needed. This construction work is done in advance of any particular need therefor. None of it, of course, is put in use until the substitution actually occurs.

Long prior to the day in question the railroad determined to do certain excavation work for a new grade near the blind station of Lone Pine, Washington. It had nothing to do with the main line track and was being done away from it, off to one side. When completed the grade would be used in place of the main line track at that particular point. The work necessitated the movement of a large quantity of waste material (*Record*, 179).

Subsequently, another piece of excavation work was determined upon. At the station of Ewan, Washington, it was necessary to excavate in advance for the construction of independent side tracks, stock pens, warehouse and other station facilities (*Record*, 179). This work likewise required wasting a large quantity of

material. The determination of the two improvements in no way had to do with either of the trestles involved. Neither trestle called for action so far as its physical condition was concerned. They were perfect bridges. Whatever connection they had with the work determined upon was incidental and resulted from expediency and economy, as will presently be seen.

Between Lone Pine and Ewan there were two wooden trestles built in 1908 (*Record*, 183); each spanned a dry gulch or coulee. Being of wood, they were fire hazards and were structures which, in time, would either have to be replaced with like material, a steel structure or a permanent embankment. Indifferent to their physical condition, it was determined to waste the material from the aforesaid excavation work in the dry coulees spanned by them, build solid embankments and abandon the trestles, rather than to dump the waste to the side of the right of way where the work was being done. The purpose of the original work, the cause leading up to wasting the material under the trestles, the relation of the waste material to the trestles and their physical condition, were established by respondent's witnesses, Campbell and Pinson. The proof is short and we ask leave to set forth the material parts.

ARCH E. CAMPBELL, testified (*Record*, 178):

Q. What was being done at that point when Mr. Kinzell was hurt?

A. We were constructing an embankment underneath those bridges which eventually would replace the bridges.

Q. Where did you get the material from originally for the fill,

A. From the vicinty of Lone Pine, Washington.

Q. You were constructing at that point?

A. We were making a line change and grade reduction to make more economical operation at that point.

Q. Where was the line being changed with reference to the main line then in operation?

A. It was on one side of the original line.

Q. When you got through with the earth excavation there and the movement of it to these two places, what other material did you get to complete the fill or the two fills which were being made?

A. We had an improvement to make at Ewan in the nature of a line change, to afford more ground, for station facilities, side track, stock yards, etc., and we utilized the material obtained from that source for the continuation and completion of the fill.

Q. You were then excavating at Ewan for those purposes?

A. Yes, sir.

Q. On the day that Mr. Kinzell was hurt, tell the jury whether or not the fill under either one of those bridges was complete, so that it could be used instead of the bridge.

A. It was not completed under either.

Q. What were the rails and ties resting upon over which your trains were moving on the day Kinzell was hurt?

A. Resting on the bridge itself; not on the embankment.

Q. When were those two fills completed.

A. They were not completed so far as putting the track on them I should say about two months afterwards.

Q. What was done with the top of the bridge itself?

A. We took the rails off and ties off of each bridge and then we gravelled and relaid the track itself upon the fill itself; the bridge being filled was no further support for it after that time (*Record,* 179).

Q. At the time you commenced making the fill, tell the jury whether or not the fill was being made for the purpose of sustaining the bridge itself or in connection with the property.

A. It was an improvement in our railroad. We always consider a gravel fill superior to a wooden structure, and this was a permanent improvement that we were making at that time.

Q. To take the place of the bridge eventually?

A. Yes, sir.

Q. Do you know the physical condition of that bridge when you started to fill it?

A. All I know about it was, that it was in first-class condition (*Record,* 180).

J. F. PINSON testified (*Record,* 182):

Q. You were acquainted with bridges 140 and 142 at the time Mr. Kinzell was hurt?

A. Yes, sir.

Q. Have you at any time made an inspection of either one of those bridges to know its life and capacity?

A. Yes, sir.

Q. From the inspection that you made, Mr. Pinson, and your knowledge of those two bridges, what was the life of both of these bridges at the time these two fills were being constructed?

A. At least two years.

Q. What do you mean by that?

A. Two years from the date of inspection.

Q. When were these two bridges built?

A. In 1908.

Q. What was the condition of the timbers up to the time the two fills were being made with reference to their stability as a bridge?

A. The timber was in good condition.

Q. Were these fills being made for the purpose of sustaining the bridges themselves?

A. No, sir, it was not.

Q. What was the purpose of the two fills?

A. The fills were to eventually replace the bridges.

Q. Examine the blue print, Exhibit 5. What does that show with reference to the line change at Lone Pine?

A. The yellow line shows the line that was being operated and the red line the new line that was being built at that time.

Q. Now examine Exhibit 6 and state what is indicated thereon as being the work of excavation at Ewan.

A. The red lines on this blue print show the main operated line and the spur track at the time this work was going on. The heavy dotted black lines show the excavation which was made at that time (*Record,* 183).

CROSS-EXAMINATION

Q. When did you make that inspection?

A. In April, 1914.

Q. You said the bridge then had two years of life?

A. At least two years (*Record,* 183).

Q. You mean by that, after that time you would have to fill in there or build a new bridge, is that the idea?

A. Probably at that time. (*Record,* 184).

Such was the work which was being done when petitioner was injured. It was work of excavation, new work, resulting in the abandonment and non-use of an inferior instrumentality for a better one. The wasting continued until the fill was high enough to meet the grade required; this went on for two months after the accident (*Record,* 179.) The fills were then left to settle and pack. Later on and after the fills had settled, so that the rails and ties could be laid thereon (*Record,* 179), the work of substitution was commenced. In the meantime, no part of the trestle timbers were disturbed or torn up and the track was left untouched, resting where it was before the first carload of waste material was dumped below and used independently of the material so dumped (*Record,* 179).

So that the construction of the fills by the wasting of the material from the excavation mentioned, was a matter of indifference and incidental to the movement of interstate commerce. Such commerce moved independently of either the excavation work or the wasting of the material. Instead of making use of the fills after

completion the railroad might well have let them lie dormant for years, or not use them at all.

The petitioner's connection with the particular work was this: As the waste material accumulated below, it came up to the sides of the track on the bridge and was then pushed away from the bridge laterally by a machine called a "bulldozer," consisting of a flat car having adjustable wings extending on each side from the rail and out a distance of about 15 feet and slanting to the rear of the car (see photo exhibits not printed). The opinion of the Idaho court (*Record*, 279), recites that the principal duty of petitioner was "to adjust these wings and, at times when they were waiting for another trainload of dirt, he and Hiram Lee, another employe upon the dozer used shovels to clean out the rocks that lodged between the tracks. The dirt was being brought to the fill by means of two trains of about twenty-five "Air Dump" cars each. When the train approached the bridge it would couple on to the dozer and proceed to the place where the dirt was to be dumped. After dumping the dirt, the cars would be righted and the train would start back, pulling the dozer after it. The wings of the dozer would level down the dirt dumped, spreading it away from the track and thus widen the fill."

It is the contention of the railroad that the excavation work from which the material was taken was new work, and that the wasting of the material thereof by way of building the embankments, was the original construction of a new roadbed; that it was not repair work nor the betterment of the wooden trestles; that the wooden trestles needed no repairing and that none

was being done at the time; that the wasting of the material in the ravines or coulees spanned by the wooden trestles was a matter of economy and good railroading, and, so far as the wooden trestles or the movement of interstate commerce was concerned, was a matter of indifference, might well have been abandoned when half completed or not have been used at all. The whole work did not differ from the building of a tunnel, a cut-off or other improvement which, when completed, would necessitate the abandonment of the old gradient line with its bridges and tracks, although they might be in perfect condition. Because petitioner removed from the track by hand-shovel, portions of the material not caught by the wings of the dozer, cannot change the fact that the work being carried on was the construction of an independent instrument. What he picked up was temporarily dumped on the track in the course of the filling. His act in making use of the hand shovel to throw the minor portions of the material from the track was not different from his previous act in making use of the dozer to spread the major portion away from the track; both acts were the same; the only difference to be found is in the use made of different implements; they changed from dozer to hand shovel. The character of the work one does cannot be changed by making use of different kinds of tools. Interstate commerce was no more blocked or endangered by the dumping of the material upon the track temporarily than by the use made of the track by the work train or the bulldozer, for each had to be removed whenever an interstate train came along. Every interstate track of a railroad is constantly used temporarily for work which is admittedly not interstate commerce. Con-

struction trains, trains moving only state commerce, etc., are apt instances where their presence upon the track would block interstate commerce if they did not get out of the way. Such use cannot change the character of the employe connected with the intrastate train or the construction train.

The Happening of the Accident and Proof Thereof.

The two trestles between Lone Pine and Ewan are known in the record as 140 and 142. At the time of the accident the embankment under trestle 142 had received all the waste material needed before settling; it was finished so far as the need of earth material was concerned. The last trainload dumped and spread at bridge 142 had preceded the trainload involved. It had left the bulldozer abont 180 feet west of trestle 140 (*Record*, 155), where it was to be picked up by the train in question and moved east to the trestle where the dumping was to be done. This trestle was 1200 feet long (see blue print not printed). The fill under it had not in many places reached the stringers (*Record*, 98, 99). Petitioner had walked from trestle 142, where the last dumping had occurred, and had climbed npon the bulldozer about the time when the dirt train involved was backing across trestle 142, which was a quarter of a mile away (*Record*, 156). He saw the train at this point and claimed he never noticed it again until it was right upon him. His excuse offered for the negligent act was, that he was all the time looking at the 1200-foot trestle to see where to spot the train for dumping (*Record*, 86, 87). Without listening for the approaching train or looking to see where it was, he claimed he was knocked off of the bulldozer by the violent speed at

which the coupling was made. Judging from the physical obstructions in his way (standing behind the high box on the bulldozer), the long distance that he would have to look from the bulldozer to the end of the 1200-foot trestle, and the whole time that he says he was looking after having first seen the train a quarter of a mile away and never again until it made the coupling, he was doing no such thing. His own proof showed that his duties did not require him to have anything to do with the coupling or operation of the train (*Record*, 85).

Moody, the brakeman on top of the front car giving signals to the engineer as the train backed for coupling, testified (*Record*, 154), that when the train was about ready to couple to the dozer, petitioner was standing back toward the center of the dozer and stepped forward, got down and shoved the knuckle open with his foot, then raised up and started back, and, just as he turned and stepped over the brace rod, the train coupled and he was tipped over backwards. The impact, the muddy and slippery condition of the floor of the dozer, caused him to lose his balance, and he was thrown against the dirt car and down (*Record*, 156, 157). He said it was then too late to bring the train to a dead stop, and that, because of the slack of the tweny-five cars running out, the train moved forward and dragged petitioner about ten feet (*Record*, 157.)

McGraw, whom the court discredited in the eyes of the jury by an uncalled-for remark in its presence (*Record*, 251) fully corroborated Moody. No damage whatever was done to any part of the dozer (*Record*, 152).

On the question of the speed of the train, *eight* eyewitnesses (*Shaughnessy, Record,* 149; *Moody, Record,* 154; *McGraw, Record* 166; *Shields, Record* 170; *Lombard, Record,* 172; *Casey, Record* 173; *Marre, Record* 174; *Brinton, Record* 177) testified, that the movement of the train at and before the coupling was made, was not greater than four miles an hour. It was pointed out by them that if the speed had been as violent as ten miles an hour, as claimed by petitioner, the bulldozer would have been damaged beyond repair.

Nicholson, a roadmaster of the Northern Pacific Railroad (*Record,* 163), a man of large experience, made it plain that if the movement was such as described by petitioner, the bulldozer would have been "torn up." He answered this question urged by petitioner's counsel on cross-examination:

"Q. Let us assume that the two men are on the dozer, one holding on with his right hand to the brace rod and left hand on the crank here, and the other on the other side holding on to the rod, and at the time this dozer was struck, their hold was broken and they were thrown down, tell us how fast that train would have to be going in order to hit it hard enough to break those men's hold?

A. I should say four miles an hour, four or five miles an hour (*Record,* 165)."

It was pleaded by petitioner and conceded at the trial, and the jury was so told, that a coupling made at four miles an hour was not negligence, and that recovery depended upon the proof that the movement was in excess of four miles an hour (*Record,* 4; *Complaint, Par.* 6).

The charge that if a "tail air hose" had been attached to the car upon which Moody was riding and signalling the engineer, the accident would have been averted, was never sustained. Over our protest (*Record*, 20; *Instruction* 4), the charge was sent to the jury (*Record*, 143). No such appliance is used in Air Dump cars and none could have been used upon the fully loaded Air Dump car involved (*Record*, 153, 158, 162). Besides, petitioner worked daily with the particular train, knew the fact that no such contrivance was used, and made no protest.

In falling backward, petitioner was thrown against a projecting bolt on the dump car, causing a laceration involving to some extent the outer sphincter; the shoulder was fractured; he was not run over. The overwhelming proof limited his injuries as above. His attempted showing of other physical injuries was feigned. Three eminent surgeons made a thorough physical examination of him six months before the trial (*Dr. Hanson, Record*, 195; *Dr. Mason, Record*, 224; *Dr. Bouffleur, Record*, 230). The examination was voluntary. These surgeons found no paralysis of the arm, no fracture of the hip, and the anus was found to be normal. His manner of using the cane indicated the fictitious character of the injury to the left hip.

After petitioner had closed his case and the defendant had made by the three doctors the complete showing mentioned, the court, over strenuous objections, ordered the petitioner stripped stark naked and in the presence of the jury, the ladies in the audience and witnesses for the defense, placed upon a table and while upon his hands and knees permitted his doctor to

experiment upon the anus by inserting his fingers therein (Fs. 1105 to 1110). The indecent experiment proved nothing except the fact that a man's anus may be instrumentally dilated so that three or four fingers, or the hand, could be inserted. It in no manner disproved the condition of the anus as found by Dr. Mason of Kellogg and Dr. Hanson at the voluntary examination six months prior to the trial. To offset as far as possible the damaging effect of the indecent exposure, Dr. Mason returned to the witness stand and showed how the anus could be juggled with, and that it was his belief that the anus had been instrumentally or artificially dilated by someone (Fs. 1358 to 1361). In this he was corroborated by Dr. Hanson. This contemptuous performance over, the court again permitted the petitioner to reopen his case to make experiments upon his shoulders and body with an electrical appliance. He was again stripped before the jury and his doctor, in ignorance of the machine he was attempting to work with, tried to show that the deltoid muscle failed to respond to electricity and that it was dead to the world. Nobody but the doctor knew (if he did) whether the current was great or small. It was wholly in the hands of the operator, and both court and jury, necessarily, were kept in ignorance. A pretty fair picture of what took place in the court room during this experiment may be found in the *Record*, pages 256 to 263, and further on, pages 267 to 271. Petitioner's doctor plead ignorance of the mechanism of the machine; did not know why it would not work. The result was that nothing was accomplished except to create confusion in the minds of the jurors with relation to the true facts in the case.

With the foregoing outline of the proof made in the case and the intolerable experiments allowed by the court, the case was sent to the jury, and it is hardly necessary to say that it went out with a feeling of prejudice inflamed by what took place at the trial. Nine of them signed a verdict against the respondent in the sum of thirty-five thousand dollars. Three refused to sign or approve the verdict. The petitioner was twenty-nine years old, earning an average of one hundred fifty dollars per month. His life expectancy was thirty-five years. The sum awarded by the jury will, at 7 per cent., earn $650.00 per year more than his monthly wages would amount to if he lives the allotted period; the excess will pay him $22,750 for 35 years of what pain and inconvenience he might suffer and on the day of his death there will be left the principal sum which the jury has given him; no allowance having been made for the earning power of the money. Judgment was entered on the verdict.

Respondent took its appeal to the Supreme Court of Idaho from the final judgment (*Record*, 34), and, in addition thereto, it appealed from the order denying its motion for a new trial (*Record*, 73).

Errors Relied Upon Involving Federal Questions.

Under the local practice, all instructions given or refused, all orders, rulings, decisions of every kind occurring upon the trial, are deemed excepted to. (*Idaho Rev. Codes*, Section 4427, as amended by Session Laws 1911, Chap. 229).

Accordingly, the statute gives the right of appeal from an order overruling a motion for new trial as well as the right of appeal from the final judgment (*Idaho Revised Statutes,* Section 4807).

1. Petitioner having failed to produce facts tending to show that he was an employe covered by the federal law, respondent's binding instruction number 16 should have been given (*Instr.* 16; *Record,* 24). It is as follows:

> "You are instructed that there is no evidence in this case to warrant a finding that the plaintiff was, at the time of receiving his injury, employed in interstate commerce or performing a service in said commerce. You will, therefore, return a verdict for the defendant."

2. The erroneous instruction No. 14, (*Record,* 29, 30), given by the court to the jury ought to be dealt with. It evades the only question of fact relating to he employment of petitioner which might have been submitted to the jury. It is as follows:

> "You are instructed that the plaintiff was engaged as an employe in interstate commerce if the work which he was doing was so closely connected therewith as to be a part of it. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars and sound, economic reasoning unites with settled rules of law in demanding that all of these instrumentalities be kept in repair. The work of keeping the roadbed, track and bridges in a proper state of repair and upkeep while thus used in interstate commerce is so closely related to such commerce as to be in practice and in legal contemplation a part of it. If you find from the evidence, therefore, that the instru-

mentality, to wit, the railroad track line and the railroad bridge where the plaintiff was working has become an instrumentality in such commerce and that the plaintiff was engaged in the work of maintaining the same in proper condition after they had become such instrumentalities and during their use as such, then it is your duty to find that the plaintiff was engaged in interstate commerce. The true test is, was the work in question a part of the interstate commerce in which the carrier was engaged? In determining this matter you should take into consideration that the statute under which the plaintiff is proceeding proceeds upon the theory that the carrier is charged with the duty of exercising proper care to prevent or correct any defect or insufficiency in its cars, engines, appliances, machinery, track, roadbed, rails, boats, wharves and other equipment used in interstate commerce, so that if you find that the plaintiff was engaged in any work which was being done for the purpose of preventing or correcting any defect or insufficiency and in repairing or keeping in repair or good condition any such instrumentality, railroad, track or bridge which had already been devoted to interstate commerce, then you are instructed that the plaintiff was engaged in interstate commerce."

3. Instruction 4 (*Record*, 20), asked by the respondent demanded the removel from the cause of the charge of negligence relative to the absence of a tail air hose attachment. It was refused. There was no proof tending to show connection between the failure to have it and the happening of the accident. A motion to the same effect was denied (*Record*, 143, 257), The instructions was:

"You are instructed that the fact that there was no tail air hose or air hose apparatus installed

> upon, or connected with, the operation of said dirt train has nothing to do with the case. Not only was defendant not required to have such apparatus upon said train or cars, but such fact was known to the plaintiff at the time he received his injury, and, knowing such fact, he cannot complain of the want thereof."

No one can say whether the jury founded its verdict on the absence of the tail air hose or on the excessive speed of the train, or on one of them; or, if upon one of them, upon which. If either was improperly submitted there should be a new trial.

4. The motion to take the whole case from the jury should have been sustained. It is as follows (*Record*, 257):

> "1. There is no evidence in the case which will justify the jury in finding that the defendant was guilty of negligence.
>
> 2. The evidence is clear and without dispute that the plaintiff was in plain sight of the train, which was moving toward him to make the coupling, and, whatever was its speed, he was either aware thereof, or, by the use of his senses, could have known and apprehended the same and avoided the risk of injury; on account of all of which he assumed the risk of the danger which befell him."

5. The verdict returned for $35,000 finds no warrant in the evidence and it has no basis except passion and prejudice produced by the court in the conduct of the trial. On appeal to the Idaho Supreme Court, the railroad insisted that the verdict was grossly excessive and was the result of erroneous instructions and based upon the passion and prejudice incited by indecent ex-

periment and the illegal demonstration allowed by the court, as shown by the printed record at pages 265, 258.

6. Respondent requested (*Instr.* 14; *Record,* 24) the Court to give to the jury a standard for use in computing the amount allowed for decrease, if any, of his earning power, and asked that it be directed to deduct from whatever sum is allowed, the earning power of that sum of money. The instruction rejected by the Court was this:

> "If you come to that stage of the case in which you are to make up a verdict for the plaintiff, it will be your duty then to determine how much to allow the plaintiff, if anything, for the diminution or decrease, if any he has sustained, of his power to earn in the future what he has been earning in the past. This element of damage is not certain or fixed and is a kind of estimated damage.
>
> To find out what plaintiff was capable of earning, you must find out what he did earn in the past and how much his capacity to do his former work has been lessened, if at all, by reason of his injury; and, having ascertained that, find out how old he is, and the number of years he probably will live, considering his age, health and habits, and the fact known to us all that men do change their mode of life; that the average man's physical capacity and earning power naturally decline rapidly after fifty years of age, and that some die sooner than others. No one can tell how long a man is going to live, but you can approximate it or average it. In arriving at the amount, you cannot, in any event, allow plaintiff a lump sum equal to what he would receive during the estimated time of his life's expectancy; that would be too much. You must take

into account the earning power of that sum of money. A sum of money now in hand is worth more than a like sum payable in the future, and the future payments which will be derived from said sum through its earning power must be discounted or substracted from the aggregate amount, otherwise plaintiff will receive more than his earning capacity would have earned him had he received no injury. Whatever sum you determine should be allowed him for the lessening of his earning capacity, if the evidence shows it has been lessened, it must not exceed the present cash value of the aggregate amount which you estimate that his earning capacity has been impaired.

Of course, if you find that plaintiff can now, or will in the future, earn as much as he has been earning in the past, then his earning capacity has not been impaired or damaged and you will allow him nothing on this element of damage."

The only direction given to the jury is the general vague and clouded charge found in instruction 6 (*Record* 26), as follows:

"The plaintiff if entitled to recover, is entitled to fair and reasonable compensation in money for the actual loss which he has sustained on account of the loss of the use of his limbs as shown by the facts in this case and in arriving at the amount of his compensation or compensatory damages you have a right to take into consideration the plaintiff's age, occupation, intelligence and qualification shown by the evidence and his earning capacity and in this connection you have a right to take into consideration the wages or salary which he was earning at and a short time prior to the happening of the accident and injury and you may also take into consideration any pain or suffering which

he may have undergone or suffered, loss of time, diminution of earning capacity, discomfort and general physical disability so far as the same may have affected his ability to walk, run or move about in the usual and ordinary way."

7. Bearing upon the amount of damages to be returned, it was the duty of the trial court to give to the jury some standard to follow in making allowance for plaintiff's contributory negligence.

Respondent requested the court to give the jury instruction 12 (*Record*, 23):

"The defendant has alleged in its answer, and has introduced proof, that plaintiff himself was guilty of negligence which was the direct cause of the injury complained of. Now, the plaintiff's negligence, if you find that he was negligent, is defined in the same manner as that of the defendant. If you believe from the evidence that the plaintiff, at the time the said coupling was being made, was doing that which a prudent man would not have done under the circumstances, or, if he failed to do that which an ordinarily prudent man would have done under all the existing circumstances, having in view the probable danger of his receiving the injury while said coupling was being made,—then I charge you that he is, with respect thereto, guilty of negligence; and if you find that his act was the proximate cause of his injury and that the act of the trainmen in making this coupling was not the proximate cause of the injury to plaintiff, then it will be your duty to find a verdict for the defendant.

In this connection, if you believe from the evidence that the plaintiff's injury was caused partly by the negligent act, if any, of the plaintiff, then

it will be your duty to compare the same in accordance with the instructions which I shall give you. In order to make clear to you what is meant by the comparison of negligence declared by the federal law to be the duty of the jury to make, let me say that your first inquiry should be:—Was the defendant guilty of negligence? Your second inquiry should be:—Was the plaintiff negligent? Your third inquiry should be:—In what degree did the negligence of the plaintiff and the negligence of the defendant contribute to the accident?

Under the federal law it is made your duty to determine what proportion. If the plaintiff's negligence contributed to or caused the accident, to the extent, we will say, of one-third of the entire negligence, then the plaintiff's damages would be reduced one-third; if to the extent of one-half, then his damages would be reduced one-half; if to the extent of two-thirds, then his damages would be reduced two-thirds; and, if his negligence was alone the cause of the accident, then, of course, that would wipe out the damages and your verdict should be in favor of the defendant; if you find that the negligence of the two is equal—that is, that the Railway Company is guilty of negligence and the plaintiff is guilty of equal negligence—you must reduce the damages one-half."

The request was denied. Whatever was said by the trial court is found in instruction 5 (*Record,* 26), as follows:

"The fact that the plaintiff was guilty of contributory negligence is not a complete defense or bar to his right to recover damages in the case, but the jury should in such case diminish the damage in proportion to the amount of negligence attributable to the plaintiff, and as hereinafter instructed."

Thereafter nothing was said by the court other than the following found in instruction 14 (*Record,* 29):

> "In an action brought against such common carrier by railroad to recover damages for personal injuries to an employee, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

And in instruction 6 (*Record* 26):

> "You must likewise take into consideration any contributory negligence of the plaintiff, if any you find.'

8. It was the duty of the court to give to the jury an instruction embodying the facts which respondent claims showed that petitioner assumed the risk. Respondent tendered such instruction. (*Instr.* 6; *Record,* 20):

> "If you find that the defendant was negligent in the manner in which the train was being moved against the dozer car for the purpose of coupling thereto, then you should pursue your inquiry further and determine whether or not the plaintiff, Mr. Kinzell, assumed the risk of his employment at the time and under the circumstances under which the accident occurred. Upon this point I advise you as follows:
>
> Assumption of risk—unlike contributory negligence—may be free from any suggestion of negligence on the part of the servant, even though the risks be obvious. The risks may be present notwithstanding the exercise of all reasonable care on his part. Some employments are necessarily fraught

with dangers to the workman, danger that must be, and is, confronted by him in the line of his duty. Such dangers as are normally and necessarily connected with the occupation are presumably taken into account in fixing the rate of wages; and a workman of mature years is taken to assume risks of this sort whether he is actually aware of them or not.

But risks of another sort, not naturally connected with the work, may arise out of the failure of the master to exercise due care in the manner and method of doing the work. These risks the servant assumes the moment he becomes aware of the danger and observes and appreciates the risk of injury therefrom. The servant cannot recover for any injuries resulting from the negligence of the master where the conditions constituting such negligence are known to the servant or are obvious and plainly observable by him and the peril clearly apparent.

Under this last rule of assumption of risks, even though you find that the dirt train was being moved toward and against the dozer car at an excessive and unreasonable rate of speed, still, if the evidence shows that Kinzll, by the exercise of his senses, knew, or ought to have known thereof, and knew and appreciated the danger therefrom, and, though having such knowledge and appreciation, he failed to do that which an ordinarily prudent man would have done under the circumstances—you must then find that he assumed the risk and he cannot recover in this action.

The evidence leaves no doubt that the plaintiff Kinsell had knowledge of the approach of the train and that it would come against the dozer car where he was standing, and the only question upon this branch of the case is whether his experience and

intelligence was such as to enable him to appreciate, and that he did appreciate, the danger from the manner in which the said train was being moved against the dozer car. If he did, he took the risk and your verdict will be for the defendant."

It was refused. Instead, the blind, vague and confusing instruction 15 (*Record*, 30) was given:

"The court instructs you that it is a general rule that a servant entering into employment which is hazardous assumes the usual risks of service and those which are apparent to ordinary observation, and when he accepts or continues in the service with the knowledge of the character of the instrumentalities from which injury may be apprehended, he also assumes the hazard incident to the situation. Those not obviously assumed by the employe are such perils as exist after the master has used due care and precaution to guard the former against danger, and the defective condition of the instrumentalities or appliances which, by the exercise of reasonable care of the master may be apprehend edand obviated, and from the consequences of which he is relieved from the responsibility to the servant by reason of the latter's knowledge of the situation is such as is apparent to his observation, or are not known to the employe."

9. The giving of instruction 10 (*Record*, 28) was manifest error. That and number 15 were against the respondent with nothing in its favor. Instruction 10 is as follows:

"You are instructed that if it was the duty of the defendant to make an easy coupling and not to strike the dozer at an unreasonable speed or with unreasonable force taking into consideration the surroundings and if you find it was negligent for

e defendant to make the coupling and strike the izer as it did strike it on the occasion in question, on the risk of such negligence, if such you find, as not assumed by the plaintiff and the defendant ould be responsible therefor."

Instruction 4 (*Record*, 25) is foreign to any issue case. It allowed the jury to find *any* act of *any* ye on the train as an act of negligence, and to the verdict on acts other than the two specific s of negligence. It is as follows:

"You are instructed that if you find from all the vidence of the case that the brakeman Moody and e engineer and other employes on the train at e time of the happening of the accident and injury the plaintiff in this action was employed by the efendant company as such employees upon the ain at the time in question I charge you that the efendant company is bound by the acts of each such employees within the scope of his employent and authority by the defendant and the dendant is responsible for *any act or acts of neglience of such employes* and if either or any of ch employees was guilty of any negligent action conduct as such employee in the discharge of his ty and employment at the time of the accident e defendant is responsible therefor and the emoyee's negligence in respect to the discharge of is duties as such employee of the defendant comany upon the said train in question, if any, was egligence of the defendant."

In sending to the jury the issue as to the ce of a "tail air hose" attachment to the car ed, the Court gave the following instruction 12 rd, 28):

"You are further instructed that if under the

evidence in this case you find that it was usual and customary and reasonable for the defendant to provide what is termed as a tail air hose on the rear end of the train and that by the operation thereof the brakeman on the train could by means of said valves stop the train in case of necessity, and if you further find from the evidence that the defendant was negligent and careless in not so equipping its said train and that the presence thereof would have prevented a collision with the dozer with such force as to knock and jar the plaintiff therefrom, then you are instructed that the defendant would be guilty of negligence."

The instruction authorized the jury to find respondent guilty of negligence, if the mere "presence thereof would have prevented a collision," notwithstanding the want of causal connection between the "presence of a tail air hose" and the happening of the accident.

Compelled to submit to the issue (*Record*, 143) respondent asked the court to tell the jury that the absence of the tail air hose in any event, was a fact known, or should have been known, to respondent (*Instr.* 4; *Record*, 20):

"You are instructed that the fact that there was no tail air hose or air hose apparatus installed upon, or connected with the operation of said dirt train, has nothing to do with this case.

Not only was defendant not required to have such apparatus upon said train or cars, but such fact was known to the plaintiff at the time he received his injury, and, knowing such fact, he cannot complain of the want thereof."

12. By instruction 13 (*Record*, 29) the jury may well have understood and found that the train crew

had the last clear chance to avert the accident, and on that ground, found a verdict. Respondent requested the court to take that question from the jury. It was refused (*Record*, 143). The instruction complained of reads thus:

> "You are further instructed that it is the duty of defendant in operating its said train and cars over the track to use reasonable care to keep a lookout ahead and if said defendant and its employes in charge of the train by keeping a lookout could have seen the said dozer upon the track and the plaintiff thereon in ample time to have stopped the said train, or to have reduced the speed of the train so as to make an easy coupling, but notwithstanding such facts failed to keep such lookout, or keeping such lookout failed to reduce the speed of the train so that an easy coupling might be made and that by reason thereof struck the train with great and unusual force and violence, jarring and knocking the plaintiff off of the said dozer, then the defendant was guilty of negligence."

13. In its entire charge the Court failed to instruct the jury as to the burden of proof, except with respect to proof of negligence. The charge is silent as to the necessity of proving the interstate character of petitioner's employment by a preponderance of the evidence. For the lack of such instruction, the verdict is not a valid decision of questions of fact subsidiary to the main question as to the interstate character of the work in which petitioner was employed.

14. During the course of the trial, and over objection (*Record*, 265) the Court ordered all the clothing to be removed from the person of petitioner and, while in that nude condition, allowed his doctor, in the pres-

ence of the jury, to experiment on the anus of petitioner by inserting his fingers therein (*Record*, 265).

While so stripped of his clothing, the Court, over objection (*Record*, 256), permitted the same doctor to experiment on the shoulder of petitioner with a galvanic battery (*Record*, 258). The matter complained of is specified as one of the errors on appeal and in the motion for new trial from which order denying said motion, in addition to its appeal from the final judgment, the railroad appealed (*Record*, 73, 34).

15. After McGraw had testified in chief, he was asked on cross-examination whether he had a prejudice or feeling against petitioner and he answered "no." (*Record*, 169). In rebuttal, over objection, attempt was made to prove that he *was* prejudiced, thereby raising a collateral issue. In sustaining respondent's objection, the court made the following prejudicial remark:— (*Record*, 250, 251):

> MR. KORTE:—I object to that as not rebuttal; collateral issue brought out on cross-examination.
>
> THE COURT:—I think it is not proper rebuttal.
>
> MR. GRAY:—Question of interest. He denied interest in that respect, feeling towards this witness.
>
> THE COURT:—*He showed very strongly that he had feeling against Kinzell while upon the witness stand.*
>
> MR. KORTE:—I think your Honor's remark is very prejudicial and I want to except to it, with all deference to the Court."

The effect of the remark denied respondent the right to have the jury, instead ofthe Court, accept or condemn

McGraw's testimony. He was the only corroborating witness of Moody's statement that the petitioner was fooling with the coupler and not engrossed in looking where to spot the train for dumping.

The errors assigned for review by the Idaho Supreme Court are certified and on file in this Court, but not printed. They are the same errors complained of in the motion for new trial found in the printed record, pages 54 to 71.

POINTS AND AUTHORITIES.

Interstate Transportation.

1. The single question decided by the Supreme Court of Idaho complained of in this proceeding involves a mixed question of law and fact. The decision rests upon findings of fact, legitimate inferences and conclusions drawn from certain contested facts and the appreciation of the facts introduced in evidence which are *final* so far as this Court is concerned. No interpretation of any of the provisions of the federal act, or the definition of legal principles in its application, is involved. (*Erie Railroad Co. vs. Welsh*, 242 U.S., 303, 306; *Seaboard Airline Railroad vs. Koennecke*, 239 U.S., 352, 355; *Great Northern Railway Co. vs. Knapp*, 240 U. S., 464, 466).

2. The Idaho decision is right. The statute has been applied in a practical way. Petitioner was not renewing an old bridge; he was constructing a substitute; he was adding to the existing plant by constructing a betterment. In legal contemplation, the work was not different

from construction elsewhere of a new roadbed to supplant the one then in use. It was like the boring of a tunnel through a mountain to take the place of a heavy grade over the mountain or the building of a cut-off to eliminate severe curves, or an elevated track to avoid grade crossings, or a double track to facilitate the movement of commerce, or a new station to supplant the old. It has been ruled that *such* work is not a *necessary* incident to interstate transportation. (*Raymond vs. Chicago, Milwaukee & St. Paul Railway,* 243 U.S., 43; *Shanks vs. Delaware, Lackawanna & Western Railway,* 239 U. S., 556; *Minneapolis & St. Louis Railway Co. vs. Nash,* 242 U.S., 619; *New York Central Railway vs. White,* 243 U. S., 188; *Delaware, Lackawanna & Western Railway vs. Yurkonis* 238 U. S., 439; *Baltimore & Ohio Railroad vs. Branson,* 242 U.S., 623; *Bravis vs. Chicago, Milwaukee & St. Paul Railway,* 217 Fed. Rep., 234 (C. C. A.); *United States vs. Chicago, Milwaukee and Puget Sound Railway,* 219 Fed. Rep., 632 (D. C.); *Chicago & Erie Railway vs. Steele,* 183 Ind., 444; *Dickinson, Receiver vs. Industrial Board,* 280 Ill., 342; *Matti vs. Chicago, Milwaukee & St. Paul Railway,* 176 Pacific Reporter, 154.

3. The nature of the work which petitioner was doing at the time is the test. *Chicago, Burlington & Quincy Railway Co. vs. Harrington,* 241 U.S., 177; *Louisville & Nashville Railway Co. vs. Parker,* 242 U.S. 13; *Erie Railway Co. vs. Welsh,* 242 U.S., 303; *Southern Railway Co. vs. Pitchford,* 253 Fed. Rep., 736 (C.C.A).

4. The whole work carried on, and not one part of it, must be considered. The primary work was the excavation made for the independent line change at Lone

Pine and the new station facilities at Ewan; the wasting of the material in the gulches under the trestles was secondary and the trestles themselves were matters of indifference. The material had to be wasted somewhere and the two gulches, fortuitously, furnished a most convenient and economical place. It was determined that the solid embankments were worth more than the perfect trestles and that the substitution of the solid embankments for the trestles would be economical and good railroading. The construction of the embankments, as substitutes for the trestles, was being done when the accident happened. The actual substitution and use of the embankments and the abandonment of the trestles occurred long after the petitioner was hurt.

5. If the embankment had been constructed off to one side of the bridge, instead of under it, no one would dare to say that such work had anything to do with interstate transportation. The *location* of the work cannot change its character.

6. To bring his case within the act, petitioner must answer the question.—Was he repairing a bridge or curing defects in an existing track? For, as said in the *Pederson* case:

> "We are not here concerned with the construction of tracks, bridges, engines or cars which have not yet become instrumentalities in such commerce, but only the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such." *Pederson vs. Delaware, Lackawanna & Western Railway*, 229 U.S., 146, 152; *Raymond vs. Chicago, Milwaukee & St. Paul Railway*, 243 U.S., 43.

7. The presumption obtains that petitioner was doing work embraced within the Washington compensation act, and he had the burden of proving not only that he was without the state act but within the federal act. *Raymond vs. Chicago, Milwaukee & St. Paul Railway*, 243 U.S., 43; *Southern Railway vs. Lloyd*, 239 U.S., 496; *Osborne vs. Gray*, 241 U. S., 16.

8. While not conclusive, it is mighty persuasive to know that the Interstate Commerce Commission, in classifying the work of filling bridges and trestles, for purposes of accounting, designates it as construction, additions and betterments, and the cost is charged to *investment* and not to *operation*. Under general instructions concerning such work, in a printed pamphlet issued July 1, 1914, it is said:

> "*Construction* (page 9), includes all processes connected with the acquisition and construction of original roadbed and equipment, road extensions, *additions and betterments.*"
>
> "*Additions* (page 10), are additional facilities, such as additional tracks, bridges and other structures."
>
> "*Betterments* (page 10), are improvements of existing facilities through the substitution of superior parts for inferior parts retired."
>
> "*Grading* (page 16). When a part of a bridge or trestle, or the entire structure, is converted by filling into an earth embankment and the bridge is used in lieu of a temporary trestle, for the purpose of filling, it shall be charged to this account (investment, not operation)."

In the classification of operating revenues and expenses, found in printed pamphlet issued July 1st, 1914, it is said:

> "*Bridges, trestles and culverts* (page 42). This account shall include the cost of repairing and watching bridges, trestles and culverts, including altering and bracing during processes of filling, removing old structures in connection with the construction of new structures."

9. The physical condition of the trestles was, by respondent, proven to be sound and without flaw, in no state of disrepair and none of its parts required renewal or displacement for at least two years, that being the estimated life of the timbers. The contrary inference drawn by petitioner to support his claim melts away in the sunlight of such true facts.

10. The suggestion made at the bar of the Idaho court, that the material being dumped necessarily strengthened the trestles while the construction work was going on, and, therefore, the work was repair work, is put aside by the findings of that court:

> "It is suggested that the material composing the fill necessarily added support to the trestle in the course of the construction thereof. This is an inference which does not follow from the testimony in the case. But, if it were true, it is but an incident to the work of making the fill and not a purpose in view in its construction."

11. The additional suggestion that, because petitioner would remove from the tracks such dirt and rocks skipped by the bulldozer, he was aiding interstate commerce, might as well apply to the bulldozer, the dirt train or

himself. The change of tools in spreading the material did not change the character of the work he was doing. It was work of spreading after dumping by use of a bulldozer and hand shovel. Such act did not change the character of the work going on, the object of which must control. *Louisville & Nashville Railway Company vs. Parker*, 242 U. S., 13; *Bravis vs. Chicago, Milwaukee & St. Paul Railway Company*, 217 Fed. Rep., 234 (C.C.A.); *Jackson vs. Industrial Board of Illinois*, 117 N. E. Rep., 705 (Ill.); *Southern Railway Co. vs. Pitchford*, 253 Fed. Rep., 736 (C.C.A.)

12. The final suggestion (hinted in the court below), that the temporary use made of the interstate track *ipso facto* turned the construction work going on into repair work, is ridiculous.

Other Federal Questions.

13. The railroad is entitled to have all the federal questions involved in its appeal to the state court reviewed by an appellate tribunal. If with respect to the one question which the state court decided, this court reaches a contrary conclusion, either a review of the whole case here should be made, or, it should be remanded to the state appellate court for further proceedings not inconsistent with the opinion. The remittitur of the judgment of that court has been stayed. (See Transcript on file, not printed).

14. In line with the exception taken to the refusal of the trial court to instruct the jury peremptorily as requesed by instruction 16, (Error, 1), the giving of instruction 14 (Error 2) was prejudicial, because, in-

stead of being comprehensive of all the conditions to be taken into account, it is merely suggestive of a line of argument on which to predicate a verdict for petitioner. It is ingeniously phrased to avoid responsibility for a decision by the court, as matter of law, of the status of the work, and it evades the only question of fact which might have been submitted to the jury. Respondent's requested instruction 1 (*Record,* 19), which was refused is based upon the evidence and conditions involved. *Norfold & Western Railway vs. Earnest,* 229, U. S., 114; *Seaboard Air Line Railway vs. Horton,* 233 U.S., 492; *Seaboard Air Line Railway vs. Tilghman,* 237 U.S., 499).

15. The court below left two questions to the jury with reference to the liability of the defendant:—*First.* whether the movement of the train, when coupling to the dozer, was in excess of four miles per hour (*Instr.* 17-a; *Record,* 33) and with such unnecessary violence as to cause the injury to plaintiff; *second,* whether the "presence of a tail air hose would have prevented a collision with the dozer with such force as to knock and jar petitioner therefrom" (*Instr.* 12, *Record,* 28) As no one can say whether the jury arrived at its verdict in favor of petitioner on both of these grounds or on one of them, and, if so, upon which ground a new trial must be granted if either was improperly submitted. *Lehigh Valley Railroad Co. vs. Normile,* 254 Fed. Rep., 680 (C.C.A.).

16. In its entire charge the court failed to instruct the jury as to the *onus probandi,* except with respect to proof of negligence. Charge 14 is silent as to the necessity of proving the interstate character of the em-

ployment by a preponderance of the evidence. For the lack of such instruction the verdict is not a valid decision of questions subsidiary to the main question dealing with the interstate character of the work in which the plaintiff was employed. *Central Vermont Railway vs. White*, 238 U.S., 507.

17. There is no causal relation between the absence of the tail air hose apparatus and the injury complained of (Error 3). The proof was made that no such contrivance is used on Western Air Dump Cars, and if present it could not, under the circumstances, with the fully loaded car, have been used with safety; that the brakeman on top of the loaded car signalling to the engineer for coupling accomplished all and more than the tail air hose could have served (*Record*, 153, 158, 162). Its absence was not the proximate cause of the damage. *St. Louis & San Francisco Railroad vs. Conarty*, 238 U. S., 243, 249; *St. Louis & Iron Mountain Railway vs. McWhirter*, 229 U.S., 265, 280, 281; *Atchison, Topeka & Sante Fe Railway vs. Swearingen*, 239 U. S., 339, 344; *Hanson vs. Great Northern Railway*, 242 US., 615; *Chicago, St. Paul, Minneapolis & Omaha Railway vs Kroloff*, 217 Fed. Rep., 525; *Henderson vs. American Lumber Company*, 70 Southern Rep., 620 (La.).

18. In sending the issue to the jury, the court (*Instr.* 12; *Record*, 28), held respondent liable if "the brakeman on the train could, by means of the valves, stop the train in cases of necessity," and the defendant was negligent if "the presence thereof (tail air hose) would have prevented a collision." (Error 11). As said in the *Kroloff* case, *supra*, "that only proves that there was an extraordinary and unusual degree of care that the com-

pany could have exercised which might have prevented the accident." In the face of the admitted testimony that the usual method of applying the air in emergency is that which was done by Moody giving a signal to the engineer to make the application, the instruction is erroneous and bad law. No modification by request could have cured it. The railroad was not required to have upon the train all the appliances known to science in order to avoid the accident. *Hanson vs. Great Northern Railway*, 242 U.S., 615.

19. The charge that the speed of the train was more than four miles an hour was not sustained. Eight unimpeached railroad men proved that the speed of the train did not exceed four miles an hour when making the coupling. Petitioner and his one witness proved nothing except that there was a severe jolt and petitioner alone was knocked from the car. This did not sustain the specific charge of negligence. *Southern Railway Co. vs. Gray*, 241 U.S., 333, 339; *Great Northern Railway vs. Wiles*, 240 U.S., 444; *Midland Valley Railroad Co. vs. Fulgham*, 181 Fed., 91, 95; *Randall vs. Baltimore & Ohio Railroad Co.*, 109 U. S., 478.

20. What is called the scintilla rule of evidence is not recognized by the Federal Supreme Court. *Pleasant vs. Fant*, 22 Wallace, 116.

21. Uncontradicted and unimpeached testimony given by railroad men is not so tainted with interest that it can be rejected by the jury, if it is fair, reasonable and consistent. *Savage vs. Rhode Island Co.*, 67 Atl. Rep., 633 (R. I.); *Seaboard Airline Railway vs. Walthour*, 43 S. E. Rep., 720 (Ga.).

22. Petitioner not only assumed the risk of the absence of the tail air hose apparatus, but he took the risk of injury from the movement of the train. He knew the train would come against the dozer at the speed of at least four miles per hour. He had ample opportunity to determine with certainty what the speed of the train was, by merely turning around and observing its movement. This he did not do. After having observed it a quarter of a mile away he turned his back upon it and did not again look until it was too late. He either took the risk of such conduct or there is no justification. for a comparison of negligences or the apportionment of their effect. *Southern Railway Co. vs. Gray*, 241 U.S., 333; *Seaboard Airline Railway vs. Horton*, 233 U.S., 492; *Boldt vs. Pennsylvania Railway Co.*, 245 U.S., 441; *Jacobs vs. Southern Railway Co.*, 241 U.S., 229; *Pollock on Torts*, 10th Ed., page 485.

23. The amount of the verdict returned is based upon an erroneous theory of the federal law. In computing the damage recoverable for future benefits, the principle limiting the recovery to compensation, *requires* that adequate allowance be made according to circumstances for the earning power of money. Requested instruction 14 (Record, 24), so instructing the jury, was refused, and thereby the respondent's federal right to have just compensation assessed was directly affected. Nowhere in the entire charge did the court say a word on the subject; the only direction given at all on damages was the clouded charge instruction 6 (*Record*, 26). The failure to tell the jury anything on the subject and to confuse them by generalities was prejudicial error, which is reflected in the excessive

verdict returned. (*Chesapeake & Ohio Railway vs. Gainey*, 241 U.S., 494; *Chesapeake & Ohio Railway vs. Kelly*, 241 U.S., 485; *Louisville & Nashville Railway Company vs. Holloway*, 246 U. S., 525).

24. It is the duty of a trial court, in its relation to the jury, to protect the parties from unjust verdicts. Having in mind that respondent laid bare petitioner's physical condition; that the alleged injury to the hip was first asserted on the morning of the trial (*Record*, 195, 224, 230); that the asserted condition of the anus was a fake and that the doctors believed the anus had been dilated for purposes of the trial (*Record*, 271), the amount allowed by the jury ($35,000), is more than compensation. If placed at legal interest it would yield an annual income greater than the amount he would earn if he worked every day of his life, would give him $22,750 for the inconvenience he might suffer and leave the principal to be disposed of at the time of his death. Such amount of damages is not "equivalent to compensation." *Norfolk & Western Railway Co. vs. Holbrook*, 235 U.S., 625, 630; *Chesapeake & Ohio Railway Co. vs. Gainey*, 241 U.S., 494).

25. When the proof points positively to a plaintiff's contributory negligence, it is not enough to merely tell the jury that "it should diminish the damage in proportion to the amount of negligence attributable to the plaintiff," where more is asked. The direction of the statute is that the damages are to be diminished in proportion to the amount of negligence attributable to the negligent employe *as compared with the combined negligence of the employe and employer*. The refusal (*Rec-*

ord, 23), to give a method to follow in making the proper allowance for petitioner's contributory negligence had no other effect than to aid the excessive verdict. The method outlined by the request, whereby to unravel and apply the formula, was practical and intended for a juror and not a mathematician. The direction must be *mandatory,* and not *optional,* as charged by the court. It is common knowledge that this part of the federal act is a farce, so far as practical application of it has been made in jury trials, unless the jury is instructed upon it. The insistence is borne out in this case. The jury allowed nothing for his negligent act in refusing to take observance of a train which he knew was backing down upon him, until it was upon him. No special finding was made by the jury exonerating the negligent act (*Record,* 16). (*Norfolk & Western Railway vs. Earnest,* 229 U.S. 114; *Seaboard Airline Railway vs. Tilghman,* 237 U. S., 499; *St. Louis & San Francisco Railroad Co. vs. Brown,* 241 U. S., 223; *Illinois Central Railroad Co. vs. Skaggs,* 240 U.S., 66; *Pennsylvania Company vs. Sheeley,* 221 Fed., 901, 906 (C.C.A.); *Waina vs. Pennsylvania Company,* 251 Pa., 213, 96 Atl. Rep., 461; *Nashville, Chicago & St. Louis vs. Banks,* 156 Ky. 609; *Ross vs. St. Louis & San Francisco Railway Co.,* 93 Kansas, 517.)

26. In sending the issue of assumption of risk to the jury, respondent was entitled to have its concrete instruction 6 (*Record,* 21), given to the jury. Where that defence is an issue and the charge given does not cover the same ground as that requested, the refusal is error. If the jury had been instructed as requested, it would have found that the risk was assumed, entitling respondent to a judgment in its favor. The vague instruction 15

(*Record*, 30), given by the court, was a mere statement of general law. A charge must be calculated to give the jury an accurate understanding of the law having reference to the phase of the case to which it is applicable. Reading instruction 10 (*Record*, 28), also excepted to, makes our point more apparent. All knowledge, or means of knowledge, and appreciation of the risk is omitted. (*Chesapeake & Ohio Railway Co. vs. De Atley*, 241 U.S., 310, 315, 316; *Seaboard Airline Railway vs. Horton*, 233. U. S., 492, 508; *Norfolk & Western Railway vs. Earnest*, 229 U.S., 114; *Boldt vs. Pennsylvania Railroad Co.*, 245 U. S., 441; *Erie Railroad Co. vs. Purucker*, 244 U.S., 320; *Kanawha Ry. vs. Kerse*, 239 U.S., 576.)

27. In this respect, instruction 4 (*Record*, 25), is wrong in law; it is misleading and foreign to the issues involved. By its plain terms the jury were at liberty to unearth *any* act against *any* employe, call it negligence and charge it to the railroad. The instruction is unfair and it should have been omitted.

28. Instruction 13 (*Record*, 29), injected a new and false issue into the case. It is erroneous in its relation to the facts and the law. No inference can be drawn from the testimony that the trainmen had the last chance to avoid the accident. The trainmen had the right to assume, until it was too late to stop the train, that petitioner was making use of his senses, saw the train coming and knew when the coupling would be made. The instruction is inapplicable to the fact situation. *Southern Railway Co. vs. Gray*, 241 U.S., 333, 339; *Coates vs. Union Pacific R. Co.*, 67 Pacific Rep., 670 (Utah).

29. When it can be said that the admission of illegal and improper testimony has left a strong impression upon the minds of the jury, exception thereto is available, where defendant's property is sought to be taken from it by the enforcement of the federal statute. Common decency and fair play ought to be enough to convince that respondent was imposed upon by the conduct of the trial in allowing the experiment on the anus of petitioner before the jury, witnesses and audience. Such unwarranted and shameful procedure could have only one object and effect,—to excite the feelings and sympathies of the jury and aggravate the amount of the award. The outrageous amount allowed indicates that it accomplished its purpose. The verdict is tainted by the procedure, and the respondent's federal right to have just compensation based upon legitimate proof, has been denied. In this respect the verdict is unjust and void. (*Brown vs. Swineford*, 44 Wisc., 282; *Garvik vs. The Burlington, Chicago, Rock Island & Northern Railway*, 124 Iowa, 691; *Guhl vs. Whitcomb*, 109 Wisconsin, 69; *Cincinnati, New Orleans & Texas Pacific Railway Co. vs. Nolan*, 170 S.W. Rep., 650 (Ky.); 1 *Thompson's Trials*, 1st Ed., Sec. 861.)

30. The experiment with the galvanic battery in the presence of the jury was not so indecent as the experiment on the anus, but just as prejudicial. It took from the jury the right to pass upon the credibility of the expert witnesses who testified on the condition of the muscles of the shoulder and allowed the issue to be settled by a man with a machine to juggle with. It is said of such experiments that "they are not countenanced, owing to the liability which exists of the

jurors being imposed upon by skillful manipulation or jugglery." 1 *Thompson on Trials,* 1st. Ed., Sec. 620.

31. The jury are the judges of the facts. The right was denied the respondent to have the jury pass upon the credibility of the witness McGraw. The trial court stated to the jury that McGraw was prejudiced against the petitioner and exception was taken to that statement (*Record,* 250, 251). McGraw and Moody were the only ones who saw petitioner at the coupler and both were positive that he was not engaged in the useless task of looking to see where to spot the dirt train. The court was without power to take away the right to have the jury pass upon McGraw's testimony. The statement was prejudicial and sufficient in itself to warrant a new trial. An incurable wound was inflicted. (*Beaumont vs. Beaumont,* 152 Fed., 55, 62; *Waldron vs. Waldron,* 156 U.S., 361, 383; *Washington Gaslight Co. vs. Lansden,* 172 U.S., 534, 555; *Throckmorton vs. Holt,* 180 U.S., 552, 567.)

ARGUMENT.

Attention is called to the incomplete printed record. The exhibits are not printed; respondent's assignments of error below have been omitted; they are all on file.

Without waiving anything heretofore insisted upon, respondent will confine itself to a short argument on the question decided by the Idaho court. That question rests upon the whole work being accomplished; not on one part of it, but on *all* its parts (*Louisville & Nashville Railway vs. Parker,* 242 U.S., 13; *Erie Railway Company vs. Welsh,* 242 U.S., 303). While positive

proof was made that none of the work was repair or up-keep of the interstate track, the whole work establishes beyond dispute what was proven on the subject. For if the later work of wasting by filling was a mere incident of the excavation work, the whole purpose was construction and substitution and not repair, and if the wasting of the excavation material was primarily to get rid of it and still use it to advantage, the construction of the fills was a matter of indifference, so far as commerce moving over the trestles was concerned. The wasting of the material might well have been accomplishd by depositing it at any place independent of the trestles and yet the trestles would have been in use wholly unrelated to the primary work of excavation and wasting. The only concern or relation the trestles had to the work was, that when the embankments would be large enough and solid enough, the trestles would, by process of substitution, be discarded and no longer used.

Railroads build for the future, and, so building, reckon with the future cost of maintenance and operation. Within such broad range of vision, many costly parts of perfect roadbed and rolling stock are frequently discarded in the accounting, none of which, at the time of abandonment, needed repair or up-keep, and might have been used for years.

And so in this case, the future cost of maintaining the trestles spanning the dry gulches would so far exceed the cost of constructing the solid embankments from the waste material that it would be poor business judgment not to construct them. If the trestles were in such an unhealthy state that they needed up-keep and repair,

a well regulated railroad would hardly have dared go into the cost of opening up particular territory from which to get filling material with which to substitute or repair them. Such an act of railroading would have been extravagance in the face of the fact that the trestles had life for at least two years before even a bent would have to be substituted. Hence, no thought of repair or up-keep was involved in the original work of excavating and wasting. The intent to repair is lacking in the proof. The element to convict has not been established. The whole purpose, from beginning to end, was not to make better the existing trestles (for they were good enough), but to excavate for new lines of track and new station facilities, and, out of the excavated material, to build a new roadbed to take the place of the old one then in use. Petitioner was working on the new roadbed and not on the old one. He was hurt before the new one was completed and long before the abandonment of the old and the substitution of the new.

The burden was on plaintiff to prove, by a preponderance of the evidence, that the work in which he was engaged was *necessary* to the movement of interstate commerce. He made no proof in chief except the fact that the fill was being made under the bridge; that he operated the machinery connected with the bulldozer; that the bridge was used by interstate trains as if no filling had been done and that the work of making the fill was not complete when he was hurt (*Record*, 98, 104, 105).

To offset anything said on the subject, respondent produced the superintendent who had charge of the work and the superintendent of bridges and buildings.

They made the purpose of the work and the condition of the trestles as plain as proof will admit (*Record*, 179, 183).

Whatever relation the petitioner bore to the commerce moving over the trestles was the same as if he had been working on a grade built to one side thereof. It was not different than if he had been helping bore a tunnel intended as a substitute for a heavy grade over the mountain. The identical claims made here were made by Raymond in his case against this ralroad. ..*Raymond vs. Chicago, Milwaukee & St. Paul Railway*, 243 U.S., 43.

The record in that case will disclose that the whole plea and the brief made rested upon the contention that the tunnel was an improvement over the existing hazardous surface grade; that it was intended to facilitate interstate commerce by betterment and substitution. The class of work and the purpose of the improvement is identical with the work here. The purpose of the work in each case is the same. Of the tunnel work it was said that it was new work, construction work, and not the repair or up-keep of the roadbed then in use.

In *Shanks vs. Delaware & Lackawanna Railway*, 239 U.S., 556, it is significantly said that "the act speaks of interstate commerce, not in a technical sense, but in a practical one better suited to the occasion," and that the work of altering the location of a fixture in a machine shop, where locomotives used in intertsate transportation were repaired, was too remote from such transportation to be practically a part of it.

In *New York Central Railway vs. Carr*, 238 U.S., 260,

it is mentioned that the work of the employe must be so directly and immediately connected with the movement of interstate commerce as "to form a *necessary* incident thereof." The court's opinion is properly reflected in the use of the words "a *necessary* incident." A mere incident of a condition is one thing, a *necessary* incident is another; the distinction is important. The work of wasting excavation material under a perfect wooden trestle, which needed no repairs, is not a *necessary* incident in the use of the trestle; until the trestle is abandoned and the embankment is used in its place, it remains an integral part of the railway track. The particular facts in the *Carr* case will demonstrate the force and effect of what is a *necessary* incident to the movement of interstate commerce in the opinion of this court.

The test in the *Carr* case was repeated in *Erie Railroad Co. vs. Welsh*, 242 U.S., 303. There it was held that whether the employe was performing an act connected with interstate transportation "as to be a part of it or a necessary incident thereto * * * depends upon whether the series of acts that he had last performed was properly to be regarded as a succession of separate tasks or as a separate and indivisible task." This case bears out our contention that the *whole* work must be considered before the *intent* can be found against respondent.

In *Louisville & Nashville Railway Co. vs. Parker*, 242 U.S., 13, it is said that the purpose or object of the work, and not the incidental acts connected with the real work being done, must control.

In *Minneapolis & St. Louis Railway Co. vs. Nash*, 242,

U.S., 619, the new structure was on its way to be substituted for the old. What was built was for substitution, but the actual work of substituting the new for the old had not commenced when Nash was hurt.

In *New York Central Railway Co. vs. White*, 243 U.S., 188, a new station and new tracks were being constructed. White was injured while guarding the tools used in doing the work. It was said that his work "bore no direct relation to interstate transportation and had to do solely with construction work, which is clearly distinguishable, as pointed out in *Pedersen vs. Delaware, Lackawanna & Western Railroad Co.*, 229 U.S., 146, 162. And see *Chicago, Burlington & Quincy Railroad vs. Harrington*, 241 U.S., 177; *Raymond vs. Chicago & St. Paul Railway*, this day decided, 243 U. S., 43. This point therefore, is without basis in fact."

The various courts dealing with the question have had no difficulty in understanding work of the class involved, and their rulings are in harmony with the Idaho Supreme Court.

The eighth circuit court had before it a case involving identical work, except its location was off the line then being used and not on the line. In *Bravis vs. Chicago, Milwaukee & St. Paul Railway Co.*, 217 Fed. Rep. 234, a bridge on a short cut-off was being constructed. When completed, the cut-off and bridge would take the place of the main line then used in interstate commerce. Bravis met with injury while on his way home from his work, by a collision of his hand-car with a through train. It was maintained, *first*, that the work of building the cut-off was a necessary incident to interstate commerce,

and, *second*, that, in any event, the act of Bravis in removing the hand-car from the track removed an obstruction and thereby aided interstate commerce. The first claim was disposed of summarily and the second was put aside by the statement that "Bravis bore the same relation to the defendant while he was on a hand-car that he would have borne to it if he had worked on the railway track with its permission and at his own risk on his way to and from the work."

In *Chicago & Erie Railway Co. vs. Steele,* 183 Indiana, 444, ties were being distributed along the main line track for use in constructing a double or second track immediately adjacent thereto. The main line track was used by the work train upon which it dumped the ties for distribution; that court said the work being done was new construction, and that because a tie fell upon the interstate track and was removed therefrom could not change the character of the work.

In *Dickinson, Receiver vs Industrial Board,* 280 Illinois, 342, the construction carried on by the railroads was the elevation of their tracks above the surface grade in the city of Chicago. The employe was hurt while helping in that class of work. It was said that the work of constructing the fills for the elevated tracks was new work, and that "it was a matter of indifference, so far as interstate commerce in which the railroad was engaged was concerned, although the structure to be erected might be an instrument of such commerce." We can see no difference between th substitute being built and the embankments in question.

In applying the federal act to the work being done and

petitioner's connection therewith, the Idaho court took a practical view of the statute and its decision should be affirmed.

Respectfully submitted,
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